IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.09.2006

CORAM

THE HONOURABLE MR. JUSTICE K.N.BASHA

Criminal Appeal No.883 of 1998

M/s.Lakshmi Srinivas Savings &
Chit Funds Syndicate Pvt. Ltd.,
rep. by its present Foreman
N. Sathiyam .. Appellant/Complainant

Vs.

S. Bhojarajan .. Respondents/Accused

* * *

Criminal appeal against the order dated 26.02.1998 in C.C.No.208 of 1996 on the file of the learned Judicial Magistrate, Udhagamandalam.

* * *

For Appellant : Mr.C.A.Diwakar

For Respondent : Mr.Sunder Mohan for
M/s.C.Ramkumar
M.V.Kaniraj

J U D G M E N T

This appeal is preferred by the complainant challenging the order of acquittal passed by the learned Judicial Magistrate, Udhagamandalam, in C.C.No.208 of 1996 dated 26.02.1998 acquitting the accused for the offence under Section 138 of Negotiable Instruments Act (hereinafter referred to as "the Act").

2. The case of the complainant is that the accused issued a cheque, Ex.P.1, dated 12.10.1993 for an amount of Rs.1,00,000/- drawn on Canara Bank, Denaducombai Branch, Udhagamandalam. The complainant thereafter presented the said cheque for payment though their Bankers M/s.Vijaya Bank, Udagamandalam, on 12.10.1993 and the same was dishonoured by the bankers on the ground that the account was already closed. The Bank Memo dated 15.10.1993 is marked as Ex.P.2 and the Bank Intimation dated 18.10.1993 is marked as Ex.P.3. The complainant thereafter sent a registered legal notice dated 30.10.1993, Ex.P.4 and the acknowledgment for the same is marked as Ex.P.5. The accused has also sent a reply notice in Ex.P.6 denying the allegations of the complainant. Ex.P.7 is the Savings Bank Deposit rules and regulations of Canara Bank and Ex.P.8 is the Statement of Accounts.

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3. The complainant, in order to prove his case examined P.Ws.1 and 2. P.W.1 is the Foreman of the complainant Company and P.W.2 is the Bank Manager.

4. When the accused was questioned under Section 313 of Cr.P.C. in respect of incriminating materials made appearing against him through the evidence of P.Ws.1 and 2, the accused has come forward with the version of total denial. He has not chosen to examine any witness on his side.

5. The learned Trial Judge on consideration of the entire evidence adduced by the complainant, both oral and documentary evidence, has come to the conclusion that the complainant failed to prove his case and acquitted the accused on the following grounds :

(1) That there is a delay in representation of the complainant nearly about 2 years and 8 months and there is no explanation or sufficient cause given by the complainant in respect of such delay. Therefore, it is held that cognizance of the offence was taken in this matter beyond the period of limitation and no condonation of delay petition filed as contemplated under Section 468 of Cr.P.C.

(2) That P.W.1, who has filed the complaint has not produced any authorization or any Power of Attorney given by the company viz., the complainant, authorising him to initiate proceedings against the accused. Therefore, the evidence of P.W.1 is unacceptable and the entire initiation of proceedings is vitiated.

(3) Ex.P.1, cheque contains different inks, namely, the amount is written in one ink and the signature was made in a different ink. Further the name of the complainant is M/s.Lakshmi Srinivas Savings and Chit Funds Syndicate Private Limited. But the cheque, Ex.P.1 is given in favour of M/s.Sri Srinivas Chit Funds Private Limited. Therefore the complainant viz., M/s.Lakshmi Srinivas Savings and Chit Funds Syndicate Private Limited is not competent to file a complaint on the basis of the cheuqe, Ex.P.1.

(4) The complainant has not proved that Ex.P.1 was issued only to the complainant company.

(5) The complainant has not produced the account books for giving the loan of Rs.1,00,000/- to the accused. The complainant has also not able to prove that both the complainant company viz., M/s.Lakshmi Srinivas Savings and Chit Funds Syndicate Private Limited as well as the company in whose favour the cheque, Ex.P.1 issued, namely, Srinivas Chit Funds Private Limited are one and the same or sister concern.

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(6)The complainant has not proved the legally enforceable liability on the part of the accused.

Being aggrieved against the order of acquittal the complainant has come forward with this appeal.

6. Mr.C.A.Diwakar, learned counsel for the appellant contended that the learned Magistrate has committed an error of law in acquitting the accused. It is also submitted by the learned counsel for the appellant that the reasons given by the learned Magistrate for acquitting the accused are contrary to the materials available on record. The learned counsel for the appellant further pointed out that the appellant has also come forward with a petition before this Court in Crl.M.P.No.4042 of 2006, filed under Section 391 of Cr.P.C. for adducing additional evidence in the appeal by producing the letter of appointment dated 08.01.1991 and the Power of Attorney dated 09.01.1991 as additional evidence and further submitted that P.W.1 was working as a Foreman in the complainant company and therefore he is a competent to initiate action against the accused and also to give the evidence on behalf of the company. The learned counsel for the appellant further submitted that the accused has failed to rebut the presumption contemplated under Section 139 of the Act in respect of legally enforceable liability by presenting the evidence before the Trial Court. The learned counsel for the appellant lastly submitted that yet another reason given by the learned Magistrate for acquitting the accused is that there was delay in representation of the complaint is also unsustainable as the complainant was filed the complaint in time and therefore there is no delay in representing the complaint as on relevant date on which actually the Magistrate taken the complaint on file.

7. Mr.Sunder Mohan, learned counsel for the respondent/accused contended that the learned Magistrate has given clear and categorical reasons for acquitting the accused and those reasons are based on materials available on record. It is also submitted by the learned counsel for the respondent/accused that admittedly P.W.1 who claimed to be the Foreman of the complainant company has not produced any authorization or Power of Attorney document empowering him to file a complaint on behalf of the company. It is submitted by the learned counsel for the respondent/accused that in view of the above said infirmity the entire proceeding is vitiated and the learned counsel also placed reliance on the decision of the Hon'ble Supreme Court of India in M.M.T.C. Ltd., Vs. M/s.Medchi Chemcials & Pharma (P) Ltd., reported in 2002 (1) Crimes 156 (SC). The learned counsel for the respondent further contended that there are other infirmities viz., Ex.P.1 cheque was issued only in favour of the company, namely, Srinivas Chit Funds Private Limited, whereas the name of the complainant company is M/s.Lakshmi Srinivas Savings and Chit Funds Syndicate Private Limited and therefore it cannot be construed that the complainant is a payee. The complainant is not at all competent to file the complaint on behalf of the complainant company and as such the complaint is not maintainable for the offence under Section 138 of the Act. The learned counsel for the respondent/accused lastly submitted that the accused has rebutted the presumption

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contemplated under Section 139 of the Act by placing reliance on the answers elicited in the cross-examination of P.W.1 as well as as by circumstances and preponderance of probabilities. The learned counsel for the respondent/accused submitted by placing reliance on the admission of P.W.1 in his evidence, namely, that the loan was given on the basis of promissory note and admittedly promissory note did not produced before the Court by the complainant. P.W.1 further stated in the cross that he cannot state on which date the amount of Rs.1,00,000/- was given as a loan to the accused.

8. I have given my careful consideration to the rival contentions put forward by either side.

9. At the outset, it is to be stated that the case of the complainant suffers from infirmities. The first and foremost contention of the learned counsel for the respondent/accused is that the cheque, Ex.P.1 was issued only in favour of M/s.Srinivas Chit Funds Private Limited, whereas the name of the complainant company in this case is M/s.Lakshmi Srinivas Savings and Chit Funds Syndicate Private Limited and therefore this Court is of the considered view that the complaint filed by the complainant under Section 138 of the Act is not at all maintainable. Further it is also relevant to be noted that the notice in this case, Ex.P.4 is also issued by M/s.Lakshmi Srinivas Savings and Chit Funds Syndicate Private limited whereas the cheque Ex.P.1 was issued only in favour of the M/s.Srinivas Chit Funds Private Limited and therefore only the said company is the payee and only the said company is competent to issue any notice demanding the accused to call for settling the dues towards the dishonoured cheque and such being the legal position, the notice Ex.P.4 issued by the complainant in this case is itself defective and it would not be construed to be a notice as contemplated under Section 138 of the Act. Therefore, in my considered view the entire proceedings is vitiated on this sole ground.

10. As pointed out by the learned counsel for the respondent/accused that the case of the complainant suffers from several other serious infirmities viz., that P.W.1 is admittedly not authorised person or he has been appointed through Power of Attorney document to present the complaint in this case on behalf of the complainant company. The learned counsel rightly placed reliance on the decision of the Apex Court in M.M.T.C. Ltd., Vs. M/s.Medchi Chemcials & Pharma (P) Ltd., reported in 2002 (1) Crimes 156 (SC). In that decision the Hon'ble Supreme Court has categorically held that,

> "when the complainant is a body corporate it is the *de jure* complainant, and it must necessarily associate a human being as *de fact complainant* to represent the former in court proceedings. It has further been held that no Magistrate shall insist that the particular person, whose statement was taken on oath at the first instance, alone can continue to represent the company till the end of the proceedings. It has been held that there may be occasions when different persons can

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represent the company. It has been held that it is open to the *de jure* complainant company to seek permission of the court for sending any other person to represent the company in the court. Thus, even presuming, that initially there was no authority, still the Company can, at any stage, rectify that defect. At a subsequent stage the Company can send a person who is competent to represent the company. The complaints could thus not have been quashed on this ground."

11. But in this case, the undisputed fact remains till the conclusion of the trial the complainant has not produced any authorization or any Power of Attorney document and on the other hand the complainant has come forward with the petition before this Court in Crl.M.P.No.4042 of 2006 for producing two documents, namely, letter of appointment dated 08.01.1991 and Power of Attorney dated 09.01.1991 as additional evidence. The fact remains that the perusal of the both the above said documents clearly shows that those documents are only in respect of the appointment of P.W.1 as Foreman and there is absolutely no authorization or power given to P.W.1 for initiating any proceedings much less the proceedings under Section 138 of the Act.

12. The last but not least submission made by the learned counsel for the respondent/accused is also with all force, namely, that the respondent/accused has rebutted the presumption contemplated under Section 139 of the Act by placing reliance on the answers elicited from P.W.1 as as well as by circumstances of preponderance of probabilities. As rightly pointed out by the learned counsel for the respondent/accused, P.W.1 has categorically stated in his cross that he has totally unaware about the transaction took place between the accused and the complainant company and it is further admitted by P.W.1 that he cannot even state that on which date an amount of Rs.1,00,000/- has given as a loan to the accused.

13. The Hon'ble Supreme Court of India has held in a recent decision in M.S.NARAYANA MENON @ MANI VS. STATE OF KERALA reported in 2006 (3) CTC 730 that onus of the accused in criminal case is not as heavy as that of prosecution and he may be compared with defendant in Civil case and further held that the rebuttal of the presumption contemplated under Section 139 requires only probable defence and standard of proof is preponderance of probabilities.

14. Therefore, for the reasons stated above, this Court is of the considered view that there is absolutely no infirmity or illegality found in the order of the learned Magistrate and the learned Magistrate has not overlooked or ignored any material

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evidence available on record warranting the interference of this Court in the order of acquittal. The appeal is dismissed.

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Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Judicial Magistrate, Udhagamandalam.

2. -do- Through The Chief Judicial Magistrate, Coimbatore

1 cc to Mr.C.A.Diwakar, Advocate, SR.40396

jsk (co)

dv/13.12.06

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